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90-192

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNIVERSAL HEALTH SERVICES OF NEVADA, INC.,
Petitioner,

v.

AEROSPATIALE HELICOPTER CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

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July 30, 1990

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QUESTIONS PRESENTED*

1. When three Nevada employees are killed in Nevada in the course of their employment by a Nevada hospital, do the Full Faith and Credit and Due Process Clauses of the United States Constitution require Texas courts to apply Nevada's workers' compensation law regarding the enforceability of a general indemnity clause between the Nevada hospital and a Texas manufacturer which had settled wrongful death suits brought against the manufacturer in Nevada by the families of the hospital employees?

2. Whether the Texas courts violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when they enforced a general indemnity clause against a Nevada employer and in favor of a Texas manufacturer although such a clause is unenforceable under the workers' compensation laws of both Texas and Nevada?

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* In addition to the parties listed in the caption, Universal Health Services, Inc., the petitioner's parent company, was a defendant in the trial court.

In compliance with Supreme Court Rule 29.1, petitioner states that it is a wholly-owned subsidiary of UHS Holding Co., Inc., which in turn is a wholly-owned subsidiary of Universal Health Services, Inc., and that it has no subsidiaries that are not wholly owned by it.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE COURT SHOULD REVIEW THE DECISION OF THE TEXAS COURT OF APPEALS BECAUSE IT PERMITS PARTIES TO CIRCUMVENT THE WORKERS' COMPENSATION LAWS OF THE STATE OF EMPLOYMENT AND OF THE INJURY MERELY BY SPECIFYING THAT THEIR CONTRACT IS GOVERNED BY THE LAW OF ANOTHER STATE	8
II. THE COURT SHOULD REVIEW THE DECISION OF THE TEXAS COURT OF APPEALS BECAUSE IT PERMITS STATES TO DISCRIMINATE ARBITRARILY AGAINST OUT-OF-STATE EMPLOYERS WITH NO IN-STATE EMPLOYEES AND INVITES RETALIATION BY OTHER STATES	12
CONCLUSION	15
APPENDIX:	
Notice from Clerk's Office, Supreme Court of Texas, regarding overruling of motion for rehearing on May 2, 1990	1a

TABLE OF CONTENTS—Continued

	Page
Notice from Clerk's Office, Supreme Court of Texas, regarding denial of application for writ of error on March 28, 1990	2a
Decision of the Court of Appeals, dated August 25, 1989	3a
Judgment of the Court of Appeals, dated August 25, 1989	31a
Order of the Court of Appeals Overruling Motion for Rehearing, dated October 4, 1989	32a
Findings of Fact and Conclusions of Law of the District Court, dated December 4, 1986	33a

TABLE OF AUTHORITIES

CASES: Page

Aetna Casualty & Surety Co. v. L.K. Comstock & Co., 684 F.2d 1267 (9th Cir. 1982) 5
Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) 8, 9
Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 8
Barringer v. State, 111 Idaho 794, 727 P.2d 1222 (1986) 9
Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932) 8
Burnham v. Superior Court of California, 110 S.Ct. 2105 (1990) 2
Carrao Constr. Co. v. Curtis, 94 Nev. 569, 584 P.2d 1303 (1978) 6
Carroll v. Lanza, 349 U.S. 408 (1955) 8
City of San Antonio v. Schautteet, 706 S.W.2d 103 (Tex. 1986) 7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2
Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318 (1966) 9
Frith v. Harrah South Shore Corp., 92 Nev. 447, 552 P.2d 337 (1976) 10
General Motors Corp. v. National Auto Radiator Mfg. Co., 694 F.2d 1050 (6th Cir. 1982) 9
Goodemonte v. Mushroom Transp. Co., 427 F.2d 285 (3d Cir. 1970) 9
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 2
Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73 (1939) 7
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 13
Kelly v. Guyon General Piping Inc., 882 F.2d 108 (4th Cir. 1989) 9
Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923) 13
La Chance v. Hollenbeck, 695 S.W.2d 618 (Tex. Ct. App. 1985) 7

TABLE OF AUTHORITIES—Continued

	Page
Lamb v. McDonnell-Douglas Corp., 712 F.2d 466 (11th Cir. 1983)	9
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)	10
Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)	8
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	8
Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927)	13
Sersted v. American Can Co., 535 F.Supp. 1072 (E.D. Wis. 1982)	11
State Bar of Texas v. Evans, 774 S.W.2d 656 (Tex. 1989)	7
Wayne v. Olinkraft, Inc., 293 So.2d 896 (La. Ct. App.), *cert. denied*, 294 So.2d 827 (La. 1974)	9
Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958)	9
Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949)	13
WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968)	13
Young v. Mobil Oil Corp., 85 Or. App. 64, 735 P.2d 654 (1987)	11
CONSTITUTION:	
U.S. Const. amend. 14, § 1	4, 8
U.S. Const. art. IV, § 1	4, 8
STATUTES & RULES:	
Nev. Rev. Stat. Ann. § 616.265(1)(b) (Michie Supp. 1989)	2, 3, 5
Nev. Rev. Stat. Ann. § 616.270 (Michie 1986 & Supp. 1989)	10
Tex. R. App. P. 131(e) (1990)	8
Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (Vernon 1967)	3
Tex. Rev. Civ. Stat. Ann. art. 8306, § 3(d) (Vernon 1967 & Supp. 1989)	6
28 U.S.C. § 1257 (1988)	2

TABLE OF AUTHORITIES—Continued

OTHER: Page

Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173 (1981) 13

E. Scoles & P. Hay, *Conflict of Laws* § 3.34 (1984) .. 13

2A, 2B, & 4 A. Larson, *The Law of Workmen's Compensation* (1989) 9, 10, 11, 12

Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in B. Currie, *Selected Essays on the Conflict of Laws* 526 (1963) (originally published in 28 U. Chi. L. Rev. 1 (1960)) 14, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

Petitioner Universal Health Services of Nevada, Inc. respectfully requests that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth District of Texas at Dallas in this case.

OPINIONS BELOW

The opinion of the Texas Court of Appeals (App. 3a) is reported at 778 S.W.2d 492. Its order denying Universal's Motion for Rehearing (App. 32a) is not reported. The opinion of the trial court (App. 33a) is also not reported. The Texas Supreme Court's orders denying Universal's Application for Writ of Error (App. 2a) and its Motion for Rehearing (App. 1a) are not reported.

JURISDICTION

The judgment of the Texas Supreme Court denying Universal's Application for Writ of Error was entered on March 28, 1990. App. 2a. A timely petition for rehearing was denied on May 2, 1990. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Nevada workers' compensation statute states:

> "A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its pur-

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[1] The judgment of the Court of Appeals remanded the case for determination of two issues: (1) whether Aerospatiale's negligent maintenance of the helicopter's torquemeter was a "proximate cause" of the helicopter accident, in which case Aerospatiale would be barred from seeking indemnity; and (2) whether Aerospatiale is estopped from pursuing its claim for reimbursement of the $25,000 deductible under the helicopter insurance policy secured by Universal. 778 S.W.2d at 503 (App. 21a).

The court's decision should be considered "final" for purposes of determining this Court's jurisdiction, because the federal questions have been "finally determined" by the Texas courts, a reversal of the Court of Appeals' holding would "preclude any further proceedings" on Aerospatiale's indemnity claim, and a failure immediately to review the Court of Appeals' decision "might seriously erode federal policy." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). If the court does *not* review the Court of Appeals' decision at this time, Universal will be forced to undergo a costly retrial on the issue of indemnity. Were it not for Texas' unconstitutional discrimination against out-of-state employers, Universal would be immune from such a suit. The federal policy against such discrimination would thus be "seriously eroded" even if Universal were to prevail before the trial court and thus this case should be considered "final" for purposes of determining the Court's jurisdiction. Compare *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990) (considering jurisdictional issue raised on interlocutory appeal through the state courts).

pose the waiver or modification of the terms or liability created by this chapter is void." Nev. Rev. Stat. Ann. § 616.265(1)(b) (Michie Supp. 1989)

The relevant portions of the Texas Workers' Compensation statute provide:

"If an action for damages on account of injury to or death of an employee of a subscriber is brought by such employee, or by the representatives or beneficiaries of such deceased employee, or by the association for the joint use and benefit of itself and such employee or such representatives or beneficiaries, against a person other than the subscriber . . . and if such action results in a judgment against such other person or results in a settlement by such other person, the subscriber, his agent, servant or employee, shall have no liability to reimburse or hold such other person harmless on such judgment or settlement, nor shall the subscriber, his agent, servant or employee, have any tort or contract liability for damages to such other person because of such judgment or contract liability for damages to such other person because of such judgment or settlement, in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death. Tex. Rev. Civ. Stat. Ann. art. 8306, § 3(d) (Vernon Supp. 1989).

" 'Subscriber' shall mean any employer who has become a member of the association by paying the required premium." Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (Vernon 1967).

" 'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees." *Id.*

The Full Faith and Credit, Due Process, and Equal Protection Clauses of the United States Constitution provide:

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1.

STATEMENT OF THE CASE

Universal Health Services of Nevada ("Universal" or "the hospital") is a Nevada corporation, which operates the Valley Hospital Medical Center in Las Vegas, Nevada, and provides that region with an air ambulance service. On December 7, 1983, the hospital's helicopter air ambulance crashed near Las Vegas while responding to an emergency call. The three Universal employees on board—the pilot, a nurse, and a paramedic—perished in the crash. All three employees were residents of Nevada.

The families of the hospital employees brought wrongful death actions in the U.S. District Court in Nevada against Aerospatiale Helicopter Corp. ("Aerospatiale"), the company that had manufactured, repaired, and then leased the helicopter to Universal. The families alleged that Aerospatiale, the Texas-based subsidiary of an international helicopter manufacturer, was liable in tort for the helicopter's defective design and for negligently failing to repair the helicopter.

Aerospatiale settled these suits for approximately two million dollars. App. 42a.[2] It then brought this suit, in

[2] The trial court found that this settlement was "reasonable in light of Aerospatiale's potential liability to the Plaintiffs." App. 42a.

a Texas state court, seeking indemnification from Universal for the amounts that it had expended in defending and settling the wrongful death actions. Aerospatiale based its indemnity suit on a lease provision which it claimed required the hospital to indemnify Aerospatiale against "any and all losses."[3] It also relied on Paragraph IX of the lease, which provided that it should be "construed and interpreted in accordance with the laws of Texas." 778 S.W.2d at 499 (App. 12a).

Following a bench trial, the trial court ruled that Aerospatiale's claim would be barred under *both* the Nevada and Texas workers' compensation laws. The trial judge refused to enforce the choice-of-law provision in the manufacturer's lease because Nevada had a "materially greater interest" in the case than Texas and enforcement of the lease's choice-of-law provision would violate a "fundamental policy" of Nevada. App. 43a-44a. It then held that Aerospatiale's claim was barred under *Nevada's* workers' compensation statute, which categorically prohibits contracts in which an employer indemnifies a third party against suits by its employees.[4] App. 44a. In the

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[3] The relevant provision stated:

"The LESSEE will indemnify and hold harmless the LESSOR, its agents, servants, and assigns from and against any and all losses, damages, injuries, claims, demands and expenses including legal expenses of whatsoever kind and nature arising on account of (i) the use or operation of the helicopter or any part thereof, by whomsoever used or operated other than the LESSOR, its agents, servants, or employees and (ii) the installation or removal of any unit of equipment pursuant to any provisions of this lease; provided, however, that in no event shall LESSEE be liable for any loss, damage, injury or claim resulting from any latent defect which is not discovered or discoverable by LESSEE's inspection prior to taking of possession by LESSEE. LESSEE shall not be liable for loss, damage, injury or claim which is the proximate result of the sole negligence of LESSOR or LESSOR's agents, servants, or assigns." 778 S.W.2d at 500-01 (App. 15a).

[4] Nev. Rev. Stat. Ann. § 616.265(1)(b) (Michie Supp. 1989) (reproduced *supra* at pp. 2-3). See *Aetna Casualty & Surety Co. v.*

alternative, the court held that Aerospatiale's claim would also be barred under *Texas* workers' compensation law, which prohibits indemnity from employers to third parties for lawsuits by employees unless the employer has "expressly assumed" this particular liability in a written indemnity agreement.[5] App. 44a. The court found that the lease between the hospital and Aerospatiale did not contain such an express provision. *Id.* Finally, the court also held that, in any event, the claims asserted in the underlying lawsuits did not fall within the scope of the indemnity agreement. *Id.* One ground for this ruling was that the lease had not expressly provided that the hospital would indemnify Aerospatiale against its own negligence and the court had found after a trial that the accident *was* caused in whole or part by Aerospatiale's defective design and negligent maintenance of the helicopter. App. 45a.

The Texas Court of Appeals reversed the judgment of the trial court. 778 S.W.2d at 503 (App. 21a). The court found that Aerospatiale's claim fell within the lease's indemnification provision.[6] 778 S.W.2d at 502 (App. 18a). It also overturned the trial court's findings that the accident had been due to Aerospatiale's defective design and negligent maintenance of the helicopter. 778 S.W.2d at 497, 499. (App. 7a, 11a). Of relevance here, the court further ruled that: (1) the agreement could not be found void under *Nevada* law because the contract provided that it should be construed under *Texas* law and the lease had a "reasonable relationship" to Texas, 778 S.W.2d at 499 (App. 12a-13a); and (2) Aerospatiale's claim was not barred by the Texas Work-

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L.K. Comstock & Co., 684 F.2d 1267 (9th Cir. 1982); *Carrao Constr. Co. v. Curtis*, 94 Nev. 569, 584 P.2d 1303 (1978).

[5] Tex. Rev. Civ. Stat. Ann. art. 8306, § 3(d) (Vernon 1967 & Supp. 1989) (reproduced *supra* at p. 3).

[6] Justice Baker dissented from this ruling. 778 S.W.2d at 503-07 (App. 22a-30a).

ers' Compensation Act because "there is no evidence whatsoever that Universal, a Nevada corporation, was a subscriber to" that Act. 778 S.W.2d at 501 (App. 16a).

Universal filed a motion for rehearing with the court of appeals, in which it argued that the court's refusal to apply Nevada law violated the Full Faith and Credit and Due Process Clauses of the U.S. Constitution. Universal's Motion for Rehearing before the Texas Court of Appeals at 34-35. Universal also argued that, by stripping Universal of the protection of the workers' compensation laws of *both* Nevada *and* Texas, the court had violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 35-38. The court of appeals denied Universal's motion. App. 32a. Universal raised these arguments again in its Application for Writ of Error in the Supreme Court of Texas, and in its Motion for Rehearing on this Application, which were both denied by that court without written opinion. Universal's Application for Writ of Error at 28-29, 31-32; Universal's Motion for Rehearing before the Supreme Court of Texas at 24-27, 32-34; App. 1a, 2a.[7]

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[7] Under Texas law, Universal was not required to raise the constitutional issues at an earlier time. Prior to the court of appeals' decision, Universal had argued that application of Nevada law was mandated by "principles of comity" and, alternatively, that enforcement of the indemnity agreement was contrary to "public policy," as reflected in the Texas workers' compensation law. Appellee's Amended Brief in the court of appeals at 24, 37-38. The trial court had agreed with *both* these arguments. The Court of Appeals was "duty bound" to consider "any theory" that might support the trial court's judgment. *La Chance v. Hollenbeck*, 695 S.W.2d 618, 622 (Tex. Ct. App. 1985); accord, *State Bar of Texas v. Evans*, 774 S.W.2d 656, 658 n.5 (Tex. 1989); *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73, 84 (1939). Compare *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986) (new constitutional argument not raised in trial court cannot provide basis for reversing that court). It was not until the court of appeals reversed the trial court that the constitutional

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REVIEW THE DECISION OF THE TEXAS COURT OF APPEALS BECAUSE IT PERMITS PARTIES TO CIRCUMVENT THE WORKERS' COMPENSATION LAWS OF THE STATE OF EMPLOYMENT AND OF THE INJURY MERELY BY SPECIFYING THAT THEIR CONTRACT IS GOVERNED BY THE LAW OF ANOTHER STATE.

The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and Due Process Clause, U.S. Const. amend. 14, § 1, prohibit choice-of-law decisions that are arbitrary or fundamentally unfair. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981). Long ago, the Court ruled that a sister state must honor a workers' compensation law that immunizes an employer from suit if that is the law of the place of employment. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932). The rule in *Clapper* has since been liberalized to the extent that it is now clear that either the law of the state of employment or the law of the state where the injury occurred may govern a worker's claim for compensation. *Carroll v. Lanza*, 349 U.S. 408 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). However, this Court has never permitted a state with no interest, or only a casual interest, in the employment relationship or the injury to override or reject the exclusive remedy provision of another state's

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questions at issue here were raised, and Universal preserved its claims of constitutional error by promptly moving for rehearing in the court of appeals. See Tex. R. App. P. 131(e) ("Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals").

workers' compensation law. See 4 A. Larson, *The Law of Workmen's Compensation* § 86.00 (1989).[8]

In this case, there is no question that Nevada was both the state of employment and of the employees' injury. Nevertheless, the court of appeals parochially applied its *own* law to determine the employer's obligation to provide indemnity against damages suffered by its employees in the scope of their employment, even though Texas had *no* interest in the employment relationship or the employees' injury. In this context, application of Texas law is clearly arbitrary and unfair, and thus contrary to the Full Faith and Credit and Due Process Clauses of the United States Constitution.[9]

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[8] Professor Larson has summarized the case law as to what law should govern the rights of employers in actions by third parties seeking contribution or indemnity on employee claims as follows: "As to third-party actions, if compensation has been paid in a foreign state and suit is brought against a third party in the state of injury, the substantive rights of the employee, the subrogated insurance company and the employer are ordinarily held governed by the law of the foreign state, although there is contra authority." 4 A. Larson, *The Law of Workmen's Compensation*, § 88.00 (1989). See, *e.g.*, *Kelly v. Guyon General Piping, Inc.*, 882 F.2d 108 (4th Cir. 1989); *General Motors Corp. v. National Auto Radiator Mfg. Co.*, 694 F.2d 1050 (6th Cir. 1982); *Goodemonte v. Mushroom Transp. Co.*, 427 F.2d 285 (3d Cir. 1970); *Wayne v. Olinkraft, Inc.*, 293 So. 2d 896 (La. Ct. App. 1974); *Elston v. Industrial Lift Truck Co.*, 420 Pa. 97, 216 A.2d 318 (1966); *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958). The "contra authority" mentioned by Professor Larson applies the law of the state of injury as to such suits. See, *e.g.*, *Lamb v. McDonnell-Douglas Corp.*, 712 F.2d 466 (11th Cir. 1983); *Barringer v. State*, 111 Idaho 794, 727 P.2d 1222 (1986). Here, of course, Nevada is both the place of injury and the place under whose law compensation was paid.

[9] Application of Nevada law may not be rejected here on the ground that its enforcement would be "obnoxious" to the public policy of Texas. *Alaska Packers*, 294 U.S. at 548-49. As discussed below, the trial court found that the indemnification provision in the lease was also invalid under the Texas Workers' Compensation Act.

The court of appeals justified application of Texas law on the ground that the lease between the hospital and the helicopter manufacturer provided that it was to be construed under Texas law, and the manufacturer's presence in Texas gave the lease a "reasonable relationship" to Texas. 778 S.W.2d at 499 (App. 12a-13a). These contacts are clearly *not* sufficient to justify application of Texas law to determine an employer's immunity from a suit for indemnity against damages to its employees where, as here, the employer had *no authority* to contract away its immunity under the workers' compensation law of the state of employment. See note 4 *supra*. Under these circumstances, the mere fact that an employer entered a contract purporting to apply the law of another state is *irrelevant* to the issue of immunity.

If the judgment of the court of appeals is allowed to stand, third parties will be able to circumvent the third-party rights provisions of state workers' compensation laws merely by choosing the law of another jurisdiction whenever they enter into a contract with an employer. Such a result would severely undermine the workers' compensation systems of most, if not all, states. The central thrust of the workers' compensation laws in most states is a *quid pro quo* that requires employers to compensate injured workers irrespective of fault and in return immunizes them from further suit for the worker's injuries. See generally 2B A. Larson, *supra*, § 65.11.[10]

"[T]he decision whether or not to allow third-party indemnity actions is a problem common to all workers' compensation systems." *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193 n.3 (1983). Professor Larson has described this issue as being "[p]erhaps the most evenly-balanced controversy in all of compensation

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[10] In Nevada, employers are immunized from such suits by employees under Nev. Rev. Stat. Ann. § 616.270 (Michie 1986 & Supp. 1989). See, *e.g.*, *Frith v. Harrah South Shore Corp.*, 92 Nev. 447, 552 P.2d 337 (1976).

law." 2B A. Larson, *supra*, § 76.11, at 14-644. Most states ban claims for contribution. *Id.* at § 76.20. With respect to claims sounding in contractual indemnity, some states, such as Nevada, completely immunize employers from third-party indemnity suits; others, such as Texas, refuse to permit such suits unless the employer has expressly agreed to provide indemnity notwithstanding its immunity. See generally *id.* at §§ 76.42-76.44.

A rule that would allow a contracting party to circumvent the policy choice with respect to such indemnity suits made by the state of employment merely by selecting in the contract the law of some other jurisdiction could cause a state's entire workers' compensation scheme to "break down." *Young v. Mobil Oil Corp.*, 85 Or. App. 64, 72, 735 P.2d 654, 659 (1987). As the court noted in *Young*, one of the principal policies of Oregon's workers' compensation laws (and presumably Nevada's as well) is to encourage parties who have control over the employees' workplace to provide a safer workplace. *Id.* at 659. This policy would be subverted by a rule permitting parties who contract with employers to obtain indemnity for injuries to employees, since such indemnity would reduce the third party's incentive to decrease those workplace hazards over which it has control. *Id.* The limitations on employer liability in third-party suits thus forms an "essential part" of a state's workers' compensation system. *Id.*; see also *Sersted v. American Can Co.*, 535 F. Supp. 1072, 1079 (E.D. Wis. 1982) (limitation of employer liability in indemnity suits serves "fundamental state interest").

As the above discussion demonstrates, this case presents important issues relating to the degree of deference to be accorded under state law to the public policies respecting workers' compensation of a sister state. As this Court's precedents make clear, a state which has no interest in either the employment relationship or the injury may not disregard the provisions of the workers' com-

pensation law of a sister state which is both the state of employment and of the injury. Whether the parties to a contract may be properly allowed to subvert the law of the state of employment by providing that the law of another state will govern their rights presents an important issue under the Full Faith and Credit and Due Process Clauses of the United States Constitution, which warrants review by this Court.

II. THE COURT SHOULD REVIEW THE DECISION OF THE TEXAS COURT OF APPEALS BECAUSE IT PERMITS STATES TO DISCRIMINATE ARBITRARILY AGAINST OUT-OF-STATE EMPLOYERS WITH NO IN-STATE EMPLOYEES AND INVITES RETALIATION BY OTHER STATES.

As discussed above, the trial court found that the indemnity agreement would be unenforceable under the workers' compensation laws of *both* the state of employment and injury (Nevada) *and* the forum state whose law was specified in the helicopter lease (Texas). The court of appeals, on the other hand, adopted a ruling that the Nevada hospital not only should be deprived of its rights under the Nevada workers' compensation law, but also deprived of any corresponding rights under the Texas workers' compensation law. The court reasoned that the protections of the Texas Workers' Compensation Act do not apply to an out-of-state employer unless it "subscribes" to the Act, even though the employer does not employ any persons in Texas and thus has no reason to subscribe to that Act.

The decision of the court of appeals is both novel and remarkable, for the validity of agreements by employers to indemnify third parties against employee suits to date had universally been determined by reference to *some* state's workers' compensation law. See generally 2B A. Larson, *supra*, § 76.40-76.47. The decision of the court of appeals refused to apply *any* state's workers' compensation law. Instead, the court's decision consigns this

matter to a netherworld of Texas law applicable only to out-of-state employers with no in-state employees. That approach—which denies out-of-state employers the benefit of the workers' compensation laws of either the forum state or the state of employment—violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which forbids arbitrary discrimination against foreign corporations in the framing of the applicable law. See, *e.g.*, *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923); *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927); E. Scoles & P. Hay, *Conflict of Laws* § 3.34 (1984); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173, 180 (1981) (it would be unconstitutional for a "state to take the position that its protective policies extend only to its own citizens . . . .")

The distinction drawn by the court of appeals contravenes the requirement of the Equal Protection Clause that such discriminatory classification must *rationally* further a legitimate state interest. *E.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). There is no sound basis for creating a legal purgatory applicable only to out-of-state employers. Denial of immunity to out-of-state employers with no in-state employees will *not* protect the integrity of Texas' workers' compensation laws. As discussed above, workers' compensation laws are premised on a *quid pro quo* in which employers provide compensation to injured workers irrespective of any employer fault in return for immunity from further suit for the worker's injuries. See *supra* at p. 10. However, this *quid pro quo* only applies to employers that are located in the state or have employees within the state. Thus, Texas has no legitimate interest in denying imunity to an out-of-state employer which has no in-state employees, when the employer had made

the *quid pro quo* in the state of injury and of employment and would be entitled to immunity under the laws of that state.

The late Brainerd Currie, father of modern choice-of-law rules, warned against rulings like that at issue here. He observed that choice-of-law rulings should be found to violate equal protection where the rulings discriminate against foreign corporations, as for example, where a state provides immunity from tort actions to its own charities but denies such immunity to all out-of-state charitable corporations. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in B. Currie, *Selected Essays on the Conflict of Laws* 526, 565 (1963) (originally published in 28 U. Chi. L. Rev. 1 (1960)). As Currie noted:

> "If the state of incorporation should have the same immunity rule as that of [the forum state] there would be no support for denial of the exemption other than a desire on the part of [the forum state] to eat its cake and have it too—to sacrifice the interests of local plaintiffs in an effort to foster charitable enterprise, while protecting local plaintiffs against foreign charities merely because they are foreign." *Id.*

Similarly, in this case, the only conceivable reason for Texas to deny imunity to out-of-state employers with no in-state employees is to protect local plaintiffs against out-of-state employers "merely because they are foreign."

Discriminatory rulings such as that issued by the court of appeals, invite retaliation by other states. If Texas courts can deny a Nevada employer the protection against suits that is ordinarily furnished by the workers' compensation laws, the Nevada courts (and Louisiana courts, Oklahoma courts, California courts, etc.) can also deny Texas employers the protection furnished by the workers' compensation laws. Thus, third parties would be able to defeat the immunity furnished employers un-

der the workers' compensation laws of the state of employment merely by bringing their indemnity action in another state. As Professor Currie wrote: "Surely the Equal Protection Clause prevents such a debacle. The minimum significance of federal union should be that in such a case [a state] is expected to treat foreign corporations even-handedly, in the full assurance that other states will, and indeed must, do likewise with respect to [that state's] corporations." B. Currie, *supra*, at 565.

As the discussion above demonstrates, the decision of the Texas Court of Appeals raises fundamental issues with respect to a state's obligation to treat out-of-state employers in an even-handed manner when it comes to providing the protection of its own workers' compensation laws. The result below arbitrarily discriminates against the hospital by depriving it of the immunity it would receive under the workers' compensation laws of both Texas and Nevada. If other states follow the decision below, the result would be a constitutional "debacle," to use Professor Currie's words. Accordingly, this issue as well warrants review by this Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the judgment of the Court of Appeals for the Fifth District of Texas at Dallas.

Respectfully submitted,

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July 30, 1990

APPENDIX

APPENDIX

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 2, 1990

Mr. R. Brent Cooper
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Mr. Michael V. Powell
Mr. J. McElhaney/Mr. M. Harrell (C-8203)
Locke Purnell Rain Harrell
2200 Ross Avenue, Suite 2200
Dallas TX 75201

RE: Case No. C-9236

STYLE: UNIVERSAL HEALTH SERVICES OF NEVADA, INC. v. AEROSPATIALE HELICOPTER CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing in the above referenced application/s for writ of error.

Respectfully yours,

JOHN T. ADAMS
Clerk

By /s/ Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 28, 1990

Mr. R. Brent Cooper
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Dallas TX 75201

RE: Case No. C-9236

STYLE: UNIVERSAL HEALTH SERVICES OF NEVADA, INC. v. AEROSPATIALE HELICOPTER CORPORATION

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Respectfully yours,

JOHN T. ADAMS
Clerk

By /s/ Blanca E. Morin
Deputy

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-88-00730-CV

AEROSPATIALE HELICOPTER CORP.,
Appellant,

v.

UNIVERSAL HEALTH SERVICES, INC.,
Appellee.

From a District Court of Dallas County, Texas

BEFORE JUSTICES MCCLUNG, BAKER AND KINKEADE
OPINION BY JUSTICE MCCLUNG
AUGUST 25, 1989

This case is a breach of contract action arising out of the crash of a Twinstar helicopter manufactured by appellant (Aerospatiale) and leased to appellee, Universal Health Services of Nevada (Universal) for use as an air ambulance. The tragic event, which killed all aboard, took place in Nevada.

Aerospatiale maintained in the trial court, and continues to maintain here, that the crash was caused by pilot error and that they are entitled to contractual indemnity from Universal under the express terms of the lease for amounts Aerospatiale expended to defend and

settle the wrongful death suits brought against them by the families of the pilot and medical flight crew members.

Aerospatiale further alleges that Universal breached that portion of the lease requiring insurance coverage for damage to the helicopter because the policy actually acquired provided for $25,000 deductible, thereby reducing the net proceeds received. Based on these allegations, Aerospatiale sought to recover the amount of the defense and settlement expenditures in the wrongful death suits, the deductible amount under the helicopter insurance policy, its attorney's fees in this suit, and contractual interest. In a trial to the court, the court determined, for a variety of reasons, that Aerospatiale was not entitled to recover under either the indemnity or insurance provisions of the lease and rendered judgment that Aerospatiale take nothing. From this judgment Aerospatiale appeals.

Summary of Facts

The fatal flight was a medical evacuation from Las Vegas, Nevada, to Needles, California, and return. The helicopter began the flight by departing a helipad at Valley Hospital in Las Vegas at approximately 12:19 p.m., December 7, 1983. Paul Kinsey, an employee of Universal, was piloting the helicopter. Two other Universal employees, a nurse and a paramedic were also aboard the helicopter.

A few seconds after take off, an eyewitness observed that the helicopter's No. 1 engine cowling was open and stationary in a horizontal position. The cowling is the cover for one of the helicopter's two engines and when opened, the cowling is held out horizontally by a metal stay rod that has a ball-shaped end that fits into a socket on the aircraft. This cowling separated from the aircraft and was later located at a place on the ground indicating that separation took place after approximately four minutes of flight.

As the cowling departed the aircraft, the stay rod snagged a coiled steel cable connected to the governor that controlled the fuel input to the helicopter's No. 1 engine. That resulted in reducing this engine to idle speed and essentially took that one engine off-line as a power source for the helicopter.

As the model name "Twinstar" implies, the helicopter is equipped with twin engines, and is designed to, and does, fly on one engine. As a safety feature the aircraft is designed so that if one engine goes off line for any reason, the other engine automatically picks up the load. As it was designed to do, this helicopter automatically shifted all power requirements to the No. 2 engine; and the helicopter flew on and continued to fly for six more minutes, for a distance of approximately ten more miles.

At some point later, the pilot apparently looked at the instruments and saw that the No. 2 engine was running at higher than normal temperature and that the torquemeter for this engine was recording higher than normal. The trial court found that the pilot failed to follow the procedure prescribed by the aircraft's Flight Manual, to diagnose his situation.

The pilot, apparently erroneously concluding that the No. 2 engine was defective, shut off the fuel to the No. 2 engine. That action killed this engine, which at the time was the only operating engine and was supplying all of the aircraft's power. When the power was removed, the helicopter descended into the mountainous terrain. The pilot was unable to negotiate a safe landing; all aboard perished in the crash and resulting fire.

Aerospatiale brings forward thirty-three points of error on appeal. We group these points of error into subject areas and address them in that fashion.

Proximate Causation

Aerospatiale contests the court's finding that the separation of the cowling from the helicopter caused the acci-

dent. Aerospatiale asserts that the cowling separation was, "as a matter of law" not a proximate cause or a producing cause of the crash. We note that Aerospatiale misnames its sufficiency argument on this point of error in that it characterizes this point as a "matter of law" point. Aerospatiale did not have the burden at trial to prove the cowling separation caused the accident. This contention was brought forward in Universal's answer and was properly characterized there as an affirmative defense. When the complaining party's opponent had the burden on the issue, the point raising legal insufficiency is properly styled "no evidence." It is only when the complaining party had the burden on the issue and it was answered adversely that the point is styled as a "matter of law" point. Cornelius, *Appellate Review of Sufficiency of the Evidence Challenges in Civil and Criminal Cases*, 46 Tex. B. J. 439, 440 (1983).

In reviewing legal sufficiency claims we must consider only the evidence and reasonable inferences drawn therefrom which, when viewed in their most favorable light, support the trial court's finding. This Court must disregard all evidence and inferences contrary to the fact finding. If there is more than a *scintilla* of evidence to support the finding, the challenge fails. *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987).

As found by the trial court, when the engine cowling separated from the aircraft, the stay rod, which is normally used to hold the cowling open, snagged a coiled steel anticipator cable connected to the governor that controls the fuel input to the helicopter's No. 1 engine. The resulting damage reduced the No. 1 engine to idle speed and took that engine off-line as a power source for the aircraft. The aircraft, as it was designed to, automatically shifted the power requirements to the other engine. There is no evidence to indicate that the pilot was aware that this had occurred, although it would have been reflected in the instruments. The Valley Hospital

pilot continued to fly the helicopter for approximately six minutes covering a distance of approximately ten miles after the cowling separated without incident. During this six minute period the aircraft flew over numerous places where the helicopter could have safely landed, but no effort or attempt to land was undertaken. The trial court further found that the pilot did not follow the emergency procedures prescribed for such event in the flight manual of this aircraft.

We agree with Aerospatiale that there is no evidence to show that the separation of the cowling from the aircraft was a proximate cause of the accident in question. At best the cowling separation was merely a prior cause. A prior cause cannot be made the basis for an action for damages if it does nothing more than furnish a condition or give rise to the occasion which makes the injury possible, if such injury is the result of some other cause which reasonable minds would not have anticipated, even though the injury would not have occurred but for such condition. *Wolf v. Friedman Steel Sales Inc.*, 717 S.W.2d 669, 674 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

In *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370 (9th Cir. 1977) the United States Court of Appeals for the Ninth Circuit denied recovery to a plaintiff in circumstances similar to these. In that case the pilot of a twin engine Cessna aircraft was killed when he attempted take-off with only one engine operational. The pilot in that case also failed to follow owners manual procedures which would have alerted him to the rear engine failure and the accompanying danger. The *Kay* court held that the pilot's failure to follow safe operating procedures was not foreseeable by the manufacturer. *Kay v. Cessna Aircraft Co.*, 548 F.2d at 1373. Texas law also focuses on the foreseeability of the intervening party's actions:

> In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an

> injury there is a distinction between a situation in which one has created a dangerous condition and a later actor observes, or by the circumstances should have observed, the existence of the dangerous condition and a situation in which the dangerous condition is not apparent and cannot be observed by the actor. In regard to the first situation, the intervening act interrupts the natural sequence of the events and cuts off the legal effect of the negligence of the initial actor. This is based upon the premise that it is not reasonable to foresee or expect that one who actually becomes cognizant of a dangerous condition in ample time to avert the injury will fail to do so.

Wolf v. Friedman Steel Sales, Inc., 717 S.W.2d at 673. It is not contested that the helicopter flew an additional six minutes and ten miles after the engine cowling separated from the craft. All the evidence at trial showed that one engine going off line was not, in itself, an emergency situation. This helicopter was designed to continue to fly on only one engine and it did so. All testimony reflects that if the pilot had followed the proper procedures this accident would not have happened.

The testimony shows that when the pilot apparently noticed that one of his engines was not functioning properly, he resopended in a singularly reckless fashion. The pilot's first misatke was to ignore procedures outlined in the operator's manual to isolate a defective engine. Secondly, in shutting off the fuel supply to the oprating engine, the pilot had to break a safety wire placed on the switch to assure that the fuel would not be shut off accidently. The fact that a safety wire was present that had to be broken in order to shut off the fuel supply to an engine shows that shutting off the fuel was clearly contemplated as an extraordinary measure, not to be undertaken lightly. The pilot not only ignored the instructions in the manual, he also by-passed this additional safety feature in order to deliberately shut off the

fuel. The pilot's actions in this regard were not foreseeable by Aerospatiale. Aerospatiale's sixth point of error dealing with proximate cause is sustained.

Aerospatiale, in points of error fifteen through seventeen, alleges that the evidence is factually as well as legally insufficient to support findings that the torquemeter for the No. 1 engine was inoperative and that its inoperation was a proximate cause of the crash. In a trial to the court a trial court's findings of fact are reviewable for factual and legal sufficiency by the same standards as are applied in viewing the factual and legal sufficiency of evidence supporting a jury's answers to jury questions. *1st Coppell Bank v. Smith*, 742 S.W.2d 454, 459 (Tex. App.—Dallas 1987, no writ); *Baker v. Baker*, 719 S.W.2d 672, 674-75 (Tex. App.—Fort Worth 1986, no writ); *Okon v. Levy*, 612 S.W.2d 938, 941 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

In reviewing the legal sufficiency claim we must consider only the evidence and reasonable inferences drawn therefrom, which, when viewed in their most favorable light, support the trial court's findings. The Court must disregard all evidence and inferences to the contrary of the fact finding. If there is more than a *scintilla* of evidence to support the finding, the challenge fails. *Stafford v. Stafford*, 726 S.W.2d at 16 (Tex. 1987).

Appellant also raises an "against the great weight and preponderance of the evidence" factual sufficiency argument with regard to the trial court's finding that the torquemeter was defective and a proximate cause of the accident. In reviewing all factual sufficiency points, the Court will consider all of the evidence in the record that is relevant to the fact being challenged. This Court may set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Our scope is therefore broader than it was in considering appellant's legal sufficiency argument. Here we consider all of the evidence, not just evidence and

logical inferences from that evidence which support the finding of the trier of fact. However, this Court is not a fact finder. We do not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact. This is true even if there is conflicting evidence upon which a different conclusion could be supported. *Clancy v. Zale*, 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

Our reasoning on this point is the same as for the proximate cause finding with regard to the engine cowling. Even if we assume, without deciding, that there is sufficient evidence to uphold, both factually as well as legally, the trial court's finding that the torquemeter was, indeed inoperative, it was not a proximate cause of the accident.

In deciding this point, we note that there is some testimony that the torquemeter could have been a contributing cause to the accident. Accordingly, we cannot sustain Aerospatiale's legal sufficiency claim on this point. However, when weighed against all the evidence to the contrary, we hold that the finding of proximate cause was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

There was a good deal of evidence relevant to this point presented at trial: (1) There is testimony from James Thomas Moran, an air safety investigator, that the number one torquemeter was inoperational, and that, in his opinion, the defective torquemeter was another cause of the accident; however, Moran also testified that the pilot did not follow proper procedures once he determined that something was wrong with the aircraft. (2) There was a good deal of conflicting evidence on whether or not the torquemeter was operational at the time of the fatal flight, whether or not it was working at the time of the accident is speculation. (3) It is the pilot's responsibility to be sure that the aircraft is in proper flight condition. (4) If the pilot had determined

that the torquemeter was not operational at the time of the flight, there was another fully operational aircraft ready for him to utilize instead of this one. (5) If the pilot made the required preflight check of his instruments he discovered that the torquemeter was not operational, if in fact it was not, and was therefore not mislead by its improper readings. (6) The fact that one engine was not operating was not, in itself, an emergency situation. (7) There were plenty of places that the pilot could have landed the aircraft; (8) If the pilot had followed proper manual emergency procedures, it is uncontested that he would have discovered the source of the problem. (9) The pilot, in shutting off the fuel to the number two engine, not only ignored the proper procedures, but he also bypassed several safety features of the aircraft designed to prevent the fuel from being shut off except in extreme circumstances.

Where a finding of proximate causation could only be reached by indulging in speculation and the stacking of one inference upon another, such finding is against the great weight and preponderance of the evidence. *U.S. Steel Corp. v. Fiberex, Inc.*, 751 S.W.2d 628, 637 (Tex. App.—Dallas 1988, writ granted); *See Also Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex. 1988) (Directed verdict proper in medical malpractice case where plaintiff did not establish a causal connection beyond the point of conjecture; proof of mere possibilities will not support the submission of an issue to the jury). We hold that even if the torquemeter was inoperational at the time of the crash, and, even if we assume, without so holding, that it was Aerospatiale's duty to keep the craft in good repair, the finding that this defect caused the accident is against the great weight and preponderance of the evidence.

The Indemnity Agreement

Appellee urges that if we find that the accident in question is not covered under the indemnity agreement for one of several reasons we must affirm the judgment

of the trial court. We therefore must address the applicability of the agreement to the crash of the aircraft. Before addressing the indemnity agreement itself, we must settle the question of whether this contract is to be interpreted under the laws of Texas or of Nevada. We hold that the enforceability of this contract is to be determined under the laws of the State of Texas.

Paragraph IX of the lease between the parties states that the lease agreement shall be construed and interpreted in accordance with the laws of Texas. The trial court overrode the parties' contractual choice of Texas law and applied Nevada law to the indemnity clause. The court then concluded that the indemnity agreement violated a fundamental public policy of Nevada. This choice of law decision was error.

The general rule is that the law of the State where the contract is made controls with respect to validity, interpretation and obligations under the contract. If the place of performance is different from that of the making of the contract, the place of performance may control. Overriding these general principles, however, is the rule that an express agreement of the parties that the contract is governed by the laws of a particular State will be given effect if the contract bears a "reasonable relation" to the chosen State and no countervailing public policy of the forum [in this case Texas] demands otherwise. *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 808-09 (Tex. Civ. App.—Houston [14th Dist.] 1981); TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon Supp. 1989).

We conclude that this lease had a reasonable relationship to the State of Texas. Aerospatiale's facilities and headquarters are located in Grand Prairie, Texas. Rental payments were made to these offices. The lease required the return of the helicopter to Grand Prairie at the end of the lease term. There were numerous other incidental

terms of the lease that further tied the arrangement to Texas. For these reasons, we hold that the transaction bore reasonable relation to the State of Texas and that the parties' choice of law satisfies the "reasonable relation" requirement of the Texas Business & Commerce Code. *See Mostek Corp. v. Chemtron Corp.*, 642 S.W.2d 20, 24 (Tex. App.—Dallas 1982 writ dis'm. w.o.j.).

The trial court made a conclusion of law that application of Texas law to the indemnity provisions of the lease would be contrary to a fundamental policy of Nevada. This conclusion of law misconstrues the laws of Texas. The choice of law of the parties is to be given effect if the contract bears a reasonable relation to Texas and no countervailing public policy *of the forum* demands otherwise. *First Commerce Realty Inc. v. K-F Land Co.*, 617 S.W.2d at 809. It is the public policy of Texas as the forum state, not of Nevada, that impacts upon whether the parties' choice of law will be upheld. We hold that the indemnity agreement in the instant case is to be construed under Texas law, not the law of Nevada and accordingly we sustain Aerospatiale's point of error number 20.

The trial court, after coming to the conclusion that the agreement violated a fundamental policy of Nevada, invalidated the lease's indemnity clause. Since we have determined that the indemnity agreement is to be construed under Texas law we would, in the usual case, simply remand to the trial court for reconsideration of the lease under Texas law. In this case, however, the trial court went further and held, in the alternative, that the lease's indemnity clause would also fail under Texas law for several reasons. Since it is before us, we hold that the lease agreement in the instant case is valid under Texas law and accordingly sustain Aerospatiale's points of error Nos. 22 through 24.

Before we reach the validity of the contractual indemnification agreement, we must consider the effects of

Aerospatiale's decision to settle the previous Nevada actions. In the previous lawsuit, since Aerospatiale chose to settle rather than risk a trial, there were no findings of liability on their part. Where an indemnitee, absent an unconditional contractual right to settle, settles a claim against it without obtaining a judicial determination of its liability, it assumes the burden in its action for reimbursement of proving facts which might have rendered it liable to the claimant, as well as the reasonableness of the amount which it paid. It is necessary for Aerospatiale to establish that from its standpoint the settlement was made in good faith and was reasonable and prudent under the circumstances. *Pan American Gas Co. v. Natural Gas Const. Corp.*, 418 S.W.2d 380, 381 (Tex. Civ. App.—Waco, 1967 writ ref'd n.r.e.). In this case the trial court expressly found that Aerospatiale's settlement of the three Nevada actions was reasonable in light of Aerospatiale's potential liability to the plaintiffs in that case. This finding is not contested by Universal.

Universal urges in its fourth reply point that regardless of the enforceability of the indemnity agreement, the judgment of the trial court must be affirmed because when an indemnitee (Aerospatiale) pay a third party's money claim against an indemnitor (Universal) to which claim the indemnitor (Universal) had a good defense, the indemnitee (Aerospatiale) is not entitled to recover against the indemnitor (Universal). *Producing Properties, Inc. v. Sohir Petroleum Co.*, 428 S.W.2d 365, 367 (Tex. Civ. App.—Dallas, 1968, no writ). The rule in that case is not applicable here because, quite simply, Aerospatiale settled with a third party whose claim was against Aerospatiale personally. Aerospatiale did not settle a claim held by a third party against United. Aerospatiale was sued individually; their choice to settle does not bar them from seeking indemnification from United, should the contract so allow.

In its conclusion of law No. 11 the trial court concluded that the indemnity agreement in the lease did not clearly

and unequivocally provide indemnity to Aerospatiale for Aerospatiale's own negligence, strict liability, and/or gross negligence. The so-called "clear and unequivocal" test is no longer the law in Texas. These contractual indemnity agreements are to be construed under the "express negligence" doctrine which provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms.

Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract. *Ethyl Corporation v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex. 1987). The indemnity agreement in this case provides as follows:

> V. *INDEMNITY*: The LESSEE will indemnify and hold harmless the LESSOR, its agents, servants, and assigns from and against any and all losses, damages, injuries, claims, demands and expenses including legal expenses of whatsoever kind and nature arising on account of (i) the use or operation of the helicopter or any part thereof, by whomsoever used or operated other than the LESSOR, its agents, servants, or employees and (ii) the installation or removal of any unit of equipment pursuant to any provisions of this lease; provided, however, that in no event shall LESSEE be liable for any loss, damage, injury or claim resulting from any latent defect which is not discovered or discoverable by LESSEE's inspection prior to taking of possession by LESSEE. LESSEE shall not be liable for loss, damage, injury or claim which is the proximate result of the sole negligence of the LESSOR or LESSOR's agents, servants, or assigns.

We note first that this indemnity clause, by its own terms, provides no right to indemnity should there be a

finding of a latent defect which not discovered or discoverable by United or if there is a finding of sole negligence on the part of Aerospatiale. Also, the contract in question contains no provision for contractual comparative indemnity. Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. *Ethyl Corp.*, 725 at 708. Consequently, in order to be entitled to indemnity, Aerospatiale must be found to be completely blameless with regard to the accident. See *Ethyl*, 725 S.W.2d 708 (Holding that in Texas there exists no right to indemnity on a comparative basis under the common law)

In its point of error No. 24 Aerospatiale asserts that the trial court erred in holding that Aerospatiale's indemnity claim would be barred under the Texas Workers' Compensation Act. We agree. The Texas Workers' Compensation Act provision relied upon by the trial court in making this holding applies only to subcribers to the act. TEX. REV. CIV. STAT. ANN. art 8306, 13(a) (Vernon Supp. 1989). As Aerospatiale points out, there is no evidence whatsoever that Universal, a Nevada corporation, was a subscriber to the Texas Workers' Compensation Act. We sustain Aerospatiale's point of error No. 24.

We must now consider whether this accident is covered under the terms of the indemnity agreement. In points of error No. 25 through No. 27 Aerospatiale contends that the trial court erred in entering conclusions of law which state that the claims asserted in the Nevada lawsuits do not fall within the scope of the indemnity agreement. We agree.

The arguments brought forward by appellee on this point are twofold. First, Universal alleges that this incident is not covered under the indemnity agreement be-

cause the accident did not arise on account of Universal's use or operation of the helicopter. We agree with Aerospatiale that these conclusions are apparently based on the trial court's erroneous findings and conclusions that the accident was proximately caused by Aerospatiale's defective design or negligence. Because we have sustained these insufficiency points, this argument must also fail.

Universal also presents another argument, urged for the first time on appeal, that the accident in question is not covered because of certain wording in the indemnity agreement itself. The agreement in this case provides for indemnification for basically all expenses and losses arising on account of:

> (i) the use or operation of the helicopter or any part thereof, by whomsoever used or operated other than the LESSOR, its agents, servants, or employees *and* (ii) the installation or removal of any unit of equipment pursuant to any provisions of this lease . . .

Universal places special emphasis on the fact that these two subsections are joined by the word "and." Thus, they argue, to establish that the underlying claims fell within the scope of the indemnity clause, Aerospatiale was required to prove that the claims satisfied *both* subsections. Therefore, since there is no evidence in the record that the underlying claim made against Aerospatiale was based in any way on the installation or removal of any unit of equipment pursuant to a provision of the lease, Aerospatiale's claim for indemnity falls outside the scope of the indemnity provision. We disagree.

This Court is mindful of the fact that indemnity agreements are to be strictly construed in favor of the indemnitor. However, the doctrine of *strictissimi juris* is not a rule of construction. Rather, it is a rule of sub-

stantive law applicable only after the parties' intent has been ascertained through ordinary rules of construction. *Keystone Equity Management v. Thoen*, 730 S.W.2d 339, 340 (Tex. App.—Dallas 1987, no writ). In determining intent, the general rule is that words and phrases will be given their ordinary, popular, and commonly accepted meaning. *Id.*

Although in common usage "and" is conjunctive and "or" is disjunctive, and, therefore, the two are not usually interchangeable, they are interpreted as synonymous when the context so requires in order to give effect to the manifest intent. *Neighborhood Committee on Land Pollution et al. v. Board of Adjustment of the City of Dallas*, 728 S.W.2d 64, 68 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). One of the recognized uses of "and" is to refer to "either or both" of two alternatives, when "or" might be interpreted as referring to only one or the other. *Id.* A common sense reading of the indemnity agreement is that Universal agreed to indemnify Aerospatiale for liability arising from two separate circumstances which the lease placed under Universal's exclusive control: use and operation of the helicopter, and alteration of the helicopter. We hold that the accident in question is covered within the scope of the indemnity agreement contained in this lease.

Insurance Provisions of the Lease in Question

In its points of error No. 28 through No. 30 Aerospatiale alleges that the trial court erred in refusing to award Aerospatiale damages for Universal's refusal to pay the $25,000 deductible under the insurance policy secured pursuant to the lease. Because these three points of error address essentially the same issue, we address them concurrently.

The lease between Aerospatiale as lessor and Universal would provide Aerospatiale with $878,000 in insurance against total loss of the helicopter. On or about

November 30, 1983, Aerospatiale received a Telex from Universal's insurance broker confirming that "all risk" hull insurance had been obtained for the amount of $878,000, with a $25,000 "in motion" deductible. The crash occurred one week later. When the proceeds were received, Universal paid Aerospatiale $853,000, which was the amount of insurance required by the lease minus the $25,000 deductible. Aerospatiale demanded that Universal pay the $25,000 deductible, but Universal refused to do so.

Aerospatiale pleaded in the court below for recovery of the $25,000 plus interest at the contract rate of 10 percent. The trial judge entered conclusions of law stating that Universal had satisfied the provisions of the lease regarding hull insurance and that Aerospatiale has waived, and is estopped, from claiming the additional $25,000. We disagree.

Unable to locate any Texas cases on this point, we find *Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp.*, 707 F.2d 1086 (9th Cir. 1983), *cert. denied* 465 U.S. 1025 (1984) to be persuasive. In *Dillingham*, defendant was obligated to obtain full insurance on its barge for the benefit of Dillingham as insured, with loss payable to defendant. The barge was valued at $1.9 million. Defendant secured the policy, but left a $1,000,000 deductible. In the suit following loss of the barge during towing, Dillingham sought to hold defendant liable for the full amount of the policy. Defendant argued that Dillingham had waived any objection to the deductible because it was informed of the fact that the policy had this deductible provision prior to the commencement of the tow and did not object until after the sinking. This argument was rejected; Dillingham's knowledge of the deductible and failure to object simply did not amount to waiver. *Dillingham*, 707 F.2d at 1091.

The contract in this case clearly provides that Universal agreed to insure "the helicopter against total loss

in an amount not less than EIGHT HUNDRED SEVENTY-EIGHT THOUSAND DOLLARS — ($878,000)." The contract provides further that Universal obtain all risk hull insurance in the same amount. No particular insurance carrier is specified, specific insurance coverage provisions, such as deductibles, are not mentioned. The contract merely specifies the amount of coverage of the policy.

The only witness to give any testimony whatsoever about the insurance deductible was Aerospatiale's former employee McPhilimy. It was his testimony that he saw the Telex from Universal's broker and that the deductible meant to Aerospatiale that Universal was self-insuring for the deductible amount. McPhilimy explained that helicopter leases commonly purchase insurance with deductibles to lower their premiums. He explained that the only time that Aerospatiale would object to a deductible was when they did not consider a lessee creditworthy for the deductible amount.

Universal points to paragraph XIV of the lease, which provides in part:

> XIV. *DEFAULT*: In the event LESSOR deems any undertaking of LESSEE herein to be in default, LESSOR shall notify LESSEE within five (5) days from the receipt of such notice. If not corrected to the satisfaction of LESSOR within such time, LESSOR may declare the lease terminated and may take possession of the leased property from any person whomsoever in whose custody it may be found.

Universal contends that this provision of the lease, setting forth Aerospatiale's agreement to notify Universal of events of default, imposed upon Aerospatiale a duty to tell Universal that the $25,000 deductible was not satisfactory to Aerospatiale. Considering all of the evidence in the record that is relevant to the fact being challenged, we hold that there is insufficient evidence for the trial

court to have found that Universal satisfied the provisions of the lease requiring insurance coverage in the amount of $878,000 and that Aerospatiale has waived the contractual requirement of the full $878,000 in total loss coverage. We sustain points of error No. 28 through No. 30 and reverse and remand to the trial court.

Aerospatiale further contests that the trial court erred in refusing to award Aerospatiale damages in the form of agreed contractual interest for Universal's failure to make timely payment for total loss of the helicopter. Since we are reversing and remanding for reconsideration of whether Aerospatiale is entitled to the full $878,000 full value of the helicopter or is estopped from claiming entitlement to the $25,000 deductible, the calculation of the precise amount of interest due is not calculable at this time.

By way of summary, we hold the following: (1) that the engine cowling separation was not a proximate cause of the accident as a matter of law; (2) that there is insufficient evidence to support the trial court's finding that the torquemeter was inoperative and caused the accident in question, and we accordingly reverse and remand on these points; (3) that the indemnity agreement in this case is to be construed under Texas law, that this agreement is valid under Texas law; and, that the accident in question falls within the scope of the agreement; and (4) we further reverse and remand this cause on the issue of whether Aerospatiale is estopped from pursuing the entire $878,000 amount provided for in the contract.

/s/ Pat McClung
PAT MCCLUNG
Justice

Justice James A. Baker dissenting.

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-88-00730-CV

AEROSPATIALE HELICOPTER CORP.,
Appellant,

v.

UNIVERSAL HEALTH SERVICES, INC.,
Appellee.

From a District Court of Dallas County, Texas

BEFORE JUSTICES McCLUNG, BAKER, AND KINKEADE
DISSENTING OPINION BY JUSTICE BAKER
AUGUST 25, 1989

I respectfully dissent.

I would affirm the trial court's judgment regarding indemnity because Aerospatiale's claim for indemnity was not within the scope of the indemnity clause of the lease agreement. The indemnity clause provided:

> V. *INDEMNITY*: The LESSEE will indemnify and hold harmless the LESSOR, its agents, servants, and assigns from and against any and all losses, damages, injuries, claims, demands and expenses including legal expenses of whatsoever kind and nature arising on account of (i) the use or operation of the

> helicopter or any part thereof, by whomsoever used or operated other than the LESSOR, its agents, servants, or employees *and* (ii) the installation or removal of any unit of equipment pursuant to any provisions of this lease; provided, however, that in no event shall LESSEE be liable for any loss, damage, injury or claim resulting from any latent defect which is not discovered or discoverable by LESSEE's inspection prior to taking of possession by LESSEE. LESSEE shall not be liable for loss, damage, injury or claim which is the proximate result of the sole negligence of the LESSOR or LESSOR's agents, servants, or assigns.

(Emphasis added.)

General rules relating to interpretation and construction of contracts are applicable to indemnity contracts. *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64, 68 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *see Ideal Lease Service, Inc. v. Amoco Prod. Co.*, 662 S.W.2d 951, 952-53 (Tex. 1983). Under those general rules, the question of whether a contract is ambiguous is a question of law for the court. In interpreting a contract, the primary concern of the court is to ascertain and give effect to the intentions of the parties as expressed in the instrument. To achieve this object, the court will examine and consider the entire contract, seeking to harmonize and give effect to all of its provisions so that none will be rendered meaningless.

In determining whether a contract is ambiguous, the court applies established rules of interpretation. *See R & P Enterprises v. La Guarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980); *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951). Rules of construction (as opposed to rules of interpretation) are not applied unless the contract is determined to be uncertain or ambiguous. *See General Am. Indem. Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660,

661 (1960); *Universal C.I.T.*, 243 S.W.2d at 157. However, after the intent of the parties has been determined, the cardinal rule that the indemnitor is entitled to have its undertaking strictly construed in its favor may then be applied, thereby preventing liability under the indemnity contract from being extended beyond the terms of the agreement. *See Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 627 (Tex. 1963), *overruled on other grounds; Ethyl Corp, v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987; *Hudson v. Hinton*, 435 S.W.2d 211, 214 (Tex. Civ. App.—Dallas 1968, no writ); *Sun Oil*, 571 S.W.2d at 68.

If a contract is so worded that a court may properly give it a certain or definite legal meaning or interpretation, it is not ambiguous. On the other hand, a contract is ambiguous when application of proper rules of interpretation leave the court genuinely uncertain about the contract's proper meaning. *See R & P Enterprises*, 596 S.W.2d at 519; *Universal C.I.T.*, 243 S.W.2d at 157. The language used by the parties in a contract should be accorded its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985); *Fox v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1966).

The strict meaning of the words "and" and "or" are more readily departed from than the meanings of other words, and one may be read in place of the other in deference to the meaning of the context. *Young v. Rudd*, 226 S.W.2d 469, 474 (Tex. Civ. App.—Texarkana 1950, writ ref'd n.r.e.). However, the word "and" will not be construed to mean "or" except for strong reasons, and the words should never be so construed unless the context favors the conversion. Examples of such exceptional circumstances are when the substitution is necessary to effectuate the manifest intention of the user, or when the failure to substitute renders the meaning ambiguous or the result absurd, or when the failure to substitute

amounts to a refusal to correct a mistake. *See Board of Ins. Comm'rs v. Guardian Life Ins Co.*, 142 Tex. 630, 180 S.W.2d 906, 908 (1944). The words "and" and "or" are not generally treated as interchangeable unless their accurate reading renders the sense of the instrument dubious. *See Young v. Rudd*, 226 S.W.2d at 474. Ordinarly, the words "and" and "or" are in no sense interchangeable terms but are used in the structure of language for purposes entirely different, "and" being strictly of a conjunctive nature, whereas "or" is of a disjunctive nature. *Board of Ins. Comm'rs*, 180 S.W.2d at 908; *American Nat'l Ins. Co. v. Wilson State Bank*, 480 S.W. 2d 296, 300 (Tex. Civ. App.—Amarillo 1972, no writ).

Applying established rules of interpretation to determine the parties' intent as expressed in the indemnity clause, the word "and" should be accorded its plain grammatical meaning. In other words, "and" means "and"; it does not mean "or." Neither Aerospatiale nor the majority provide support for their conclusory determination that "and" should be read to mean "or." On the contrary, there are no strong reasons for departing from the general rule that "and" and "or" are not interchangeable. Reading "and" to mean "or" is not required by context or by the manifest intent of the parties. Moreover, reading "and" as "and" does not render the meaning ambiguous or the result absurd, nor does it constitute a refusal to correct a mistake. In short, there is nothing inherently unreasonable in attaching to the word "and" its normal conjunctive meaning. Had the parties intended a disjunctive meaning, they could have easily used the word "or" instead of "and." *See American Nat'l Ins.*, 480 S.W.2d at 300.

When the word "and" is given its ordinary and reasonable meaning, the indemnity clause is unambiguous. Under the plain terms of the clause, Universal is required to indemnify Aerospatiale *only* in cases involving *both* use or operation of the helicopter by anyone other

than Aerospatiale *and* the installation or removal of any unti of equipment pursuant to provisions of the lease. The record contains no evidence of installation or removal of any unit of equipment. Therefore, Aerospatiale's claim for indemnity fails because it is not within the scope of the indemnity clause. Having determined the parties' intent from the unambiguous terms expressed in their contract, the conclusion reached is then strengthened by the rule that the indemnitor (Universal) is entitled to have undertaking strictly construed in its favor, thereby preventing liability from being extended beyond the terms of the agreement. *See Ohio Oil*, 365 S.W.2d at 627; *Hudson v. Hinton*, 435 S.W.2d at 214; *Sun Oil*, 571 S.W.2d at 68.

When an indemnity contract is unambiguous, the rights and liabilities of the parties must be determined by giving legal effect to the contract as written. Intent is determined from the contract itself, and the scope of coverage stated in the indemnity contract cannot be expanded based solely upon what a court may perceive to be the improperly expressed intentions of the parties. *Ideal Lease Service*, 662 S.W.2d at 953. The result-driven conclusion reached by the majority is lacking in proper legal foundation. I would affirm the trial court's take nothing judgment on the claim for indemnity. This determination effectively disposes of all of Aerospatiale's points of error concerning the cause of the crash and enforcement of the indemnity clause. I would overrule points one through twenty-seven.

I would also affirm the trial court's judgment regarding the provision of insurance. The relevant provisions in the lease stated:

> IV. *INSURANCE:*
>
> A. LESSEE agrees to furnish LESSOR certificates of insurance evidencing that LESSEE has at LESSEE's expense:
>
> . . . .

4. insured the helicopter against total loss in an amount not less than EIGHT HUNDRED SEVENTY EIGHT THOUSAND DOLLARS —($878,000.00) U.S. Dollars.

5. obtained all risk hull insurance in the amount of not less than EIGHT HUNDERD SEVENTY EIGHT THOUSAND DOLLARS—($878,000.00) U.S. Dollars, specifying LESSOR as loss payee as its interest may appear and LESSEE as co-insured.

B. In the event of total loss, LESSEE shall immediately pay to LESSOR such monies due, together with interest at the rate of ten percent (10%) per annum on all such monies not received by LESSOR within sixty (60) days of such total loss.

The lease also contained a provision on default that stated in pertinent part:

XIV. *DEFAULT:* In the event LESSOR deems any undertaking of LESSEE herein to be in default, LESSOR *shall* notify LESSEE in writing of such default and it shall be corrected by LESSEE within five (5) days from the receipt of such notice.

(Emphasis added.)

Universal notified Aerospatiale that it had obtained hull insurance for the helicopter in the amount of $878,000 with a $25,000 "in motion" deductible. If such insurance was regarded by Aerospatiale as not in compliance with the lease provisions, Aerospatiale was required by the default provisions of the lease to notify Universal of the default. There is no evidence that Aerospatiale did so. There was testimony by John McPhilimy, a former Aerospatiale employee, that the existence of the deductible meant to Aerospatiale that Universal was self-insuring for the deductible amount. This testimony regarding Aerospatiale's unilateral view of the situation

is irrelevant. One party's self-interested and unilateral interpretation of a situation simply cannot be the basis for a claim of breach of contract. It is elementary that a contract is by definition a mutual agreement, and any breach of that agreement is determined by its express terms, not by one party's unilateral interpretation that was never communicated to the other party. *See Finley v. Hundley*, 252 S.W.2d 958, 962 (Tex. Civ. App.—Dallas, 1952, no writ); *Sweeney v. Cross*, 476 S.W.2d 464, 465 (Tex. Civ. App.—El Paso 1972, no writ).

Estoppel may arise as effectually from silence as from words spoken when there is a duty to speak. *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979); *see Echols v. Yeates Dev. Co.*, 565 S.W.2d 277, 280 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.). Estoppel by silence arises when a person is under a duty to another to speak but refrains from doing so and thereby leads the other to act in reliance upon a mistaken understanding of the facts. *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983); *Page Airways, Inc. v. Associated Radio Serv. Co.*, 545 S.W.2d 184, 193 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). According to these principles, Aerospatiale is estopped from asserting that Universal breached the lease provisions on obtaining insurance. The lease clearly required Aerospatiale to notify Universal of any breach of those provisions. Despite this duty, Aerospatiale did not notify Universal that the policy deductible was unacceptable. Aerospatiale's unilateral assumption that Universal had chosen self-insurance in the amount of $25,000 is irrelevant and provides no basis for a claim of breach of contract. On the other hand, not having been informed otherwise, Universal was entitled to rely on its apparent compliance with the insurance provisions. This reliance was clearly justified and authorized by the express terms of paragraph XIV of the lease on default. I would overrule Aerospatiale's points of error twenty-eight through thirty.

The reliance by Aerospatiale and the majority upon *Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), is misplaced. The majority ignores a number of important distinctions between *Dillingham* and this case. In *Dillingham*, a towing conartc required the defendant/owner to maintain insurance on a barge to its full value. The contract also provides that the defendant/owner would look *only* to the insurance for recovery for any loss or damage. The defendant obtained insurance with a $1,000,000 deductible, which effectively left the barge insured for about *half* of its value. *Dillingham*, 707 F.2d at 1088-89, 1091. All of these facts distinguish *Dillingham* from this case. Moreover, the *Dillingham* court acknowledged that "some deductible might have been reasonably anticipated under the contract." What the court specifically disapproved was the insuring of the barge for half of its value. *Dillingham*, 707 F.2d at 1091. In my view, *Dillingham* does not support the majority's conclusion.

In point of error thirty-one, Aerospatiale contends that the trial court erred in refusing to award damages in the form of agreed contractual interest because of Universal's failure to make timely payment of the insurance proceeds. The pertinent lease provision is found in paragraph IV, quoted above. It provided that in the event of total loss, Universal shall pay to Aerospatiale such monies due along with interest of 10 percent per annum on all such monies not received by Aerospatiale within sixty days of the total loss. The helicopter crash occurred on December 7, 1983. Universal released an insurance check for $853,000 to Aerospatiale on August 16, 1984. Under the lease, Universal was clearly obligated to pay interest on the $853,000 from sixty days after the crash to the date of release of the check. I would sustain point of error thirty-one. Because I am unable to substantiate Aerospatiale's determination of the exact amount of interest due and owing, I would overrule point of error thirty-two.

In point number thirty-three, Aerospatiale argues that the trial court erred in failing to award attorney's fees to Aerospatiale. Because point of error thirty-one should be sustained, I would also sustain point number thirty-three. In letters dated August 27, 1984, and February 7, 1985, Aerospatiale demanded to be afforded all rights to which it was entitled under the insurance provisions of the lease. Since Aerospatiale was entitled to judgment for contractual interest on the insurance proceeds, it was also entitled to an award of attorneys' fees. TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001(8), 38.002 (Vernon 1986; *see Findlay v. Cave*, 597 S.W.2d 37, 40-41 (Tex. Civ. App.—Fort Worth 1980), *aff'd*, 611 S.W.2d 57 (Tex. 1981).

In summary, points of error one through thirty and thirty-two should be overruled. Points thirty-one and thirty-three should be sustained. This cause should be remanded for determination of the amount of contractual interest owed to Aerospatiale on the insurance proceeds and for an award of attorneys' fees to Aerospatiale.

/s/ James A. Baker
JAMES A. BAKER
Justice

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-88-00730-CV

AEORSPATIALE HELICOPTER CORPORATION,
Appellant,

v.

UNIVERSAL HEALTH SERVICES, INC. AND
UNIVERSAL HEALTH SERVICES OF NEVADA, INC.,
Appellee.

BEFORE JUSTICES McCLUNG, BAKER,
AND KINDEADE

JUDGMENT

In accordance with this Court's opinion of this date, the judgment of the trial court is REVERSED and this cause is REMANDED to the trial court for new trial. It is ORDERED that Aerospatiale Helicopter Corporation recover its costs of this appeal from appellee Universal Health Services, Inc. and Universal Health Services of Nevada, Inc. The obligation of The Ohio Casualty Insurance Company as surety on appellant's cost bond are DISCHARGED.

August 25, 1989

/s/ Pat McClung
PAT McCLUNG
Justice

[State Seal]

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-88-00730-CV

AEROSPATIALE HELICOPTER CORP.,
Appellant

v.

UNIVERSAL HEALTH SERVICES, INC.,
Appellee

ORDER

Order issued October 4, 1989

It is ORDERED that the motion for rehearing filed by appellee, Universal Health Services, Inc., is OVERRULED.

/s/ Pat McClung
PAT MCCLUNG
Justice

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
160TH JUDICIAL DISTRICT

Cause No. 84-9143-H

AEORSPATIALE HELICOPTER CORPORATION,
Plaintiff, Appellant,

v.

UNIVERSAL HEALTH SERVICES, INC., *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Dec. 4, 1986]

I.

FINDINGS OF FACT

1. Aerospatiale is a corporation headquartered in Grand Prairie, Texas.

2. Universal Health Services-Nevada, Inc., d/b/a Valley Hospital (hereinafter "Valley Hospital") is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada.

3. Valley Hospital is a wholly-owned subsidiary of Universal Health Services, Inc. (hereinafter "UHS").

4. Valley Hospital does business in Nevada under the assumed name of Valley Hospital Medical Center.

5. UHS is a Delaware corporation with its principal place of business in Pennsylvania.

6. Valley Hospital began its Flight For Life program in February of 1980. The supervisory personnel included

the chief flight nurse, the chief pilot and a lead dispatcher. The Flight For Life program at Valley Hospital was a hospital-based helicopter air ambulance program. The program served areas in Nevada, California, Arizona and Utah.

7. In September of 1982, Gordon Wolfram became the Administrative Officed responsible for the operation of the Flight For Life program. In December of 1983, Paul Kinsey was employed by Valley Hospital as a pilot, Jessica Hilt was employed as a flight nurse, and Chris Hesselfeld was employed as a flight paramedic.

8. Commencing in 1979, Valley Hospital leased its helicopters for the Flight for Life program from Air West. The first helicopter supplied by Air West was an Aerospatiale A-Star, the second was an Aerospatiale Alouette 3, and the third was the Twin Star which is the subject of the present suit. The Twinstar was provided in January of 1982.

9. When Air West had the contract with Valley Hospital, it provided the aircraft, the pilots, mechnics, maintenance and parts and Valley Hospital provided the medical flight crew, medical equipment, medicine, drugs, medical supplies and quarters for the pilot on duty.

10. When the helicopter was under the Air West lease, it had numerous maintenance problems and was out of service more often than it was in. Air West had difficulty obtaining replacement parts from Aerospatiale because Aerospatiale was reluctant to deliver requested repair parts due to the financial problems of Air West.

11. In October of 1983, Valley Hospital learned that Air West, which had been in Chapter 11 Bankruptcy, was converting to Chapter 7 and that Air West would be unable to continue leasing the Twin Star to Valley Hospital.

12. Valley Hospital made arrangements with Aerospatiale to prevent its Flight for life service from being

interrupted. On October 21, 1983, McPhilimy forwarded a proposal to Wolfram for leasing the Twin Star from Aerospatiale which had previously been leased from Air West.

13. Eventually, Valley Hospital and Aerospatiale entered into a lease agreement pertaining to the Twinstar helicopter. The effective date of the lease was December 1, 1983.

14. For Aerospatiale, the negotiation of the lease agreement was conducted by John D. McPhilimy, whose office was at Aerospatiale's headquarters in Grand Prairi, Texas. Neither McPhilimy nor any person on his staff traveled to Nevada to negotiate the lease agreement. The negotiations were conducted on behalf of Universal Nevada by Gordon Wolfram, the administrative officer at Valley Hospital responsible for operation of that hospital's air ambulance program. Mr. Wolfram never traveled to Texas in connection with the negotiation or execution of the lease. The negotiations were begun by Mr. Wolfram of Valley Hospital contacting Mr. McPhilimy of Aerospatiale.

15. Each of the three pilots on Valley Hospital's staff —Ward M. Harris, Jr., Dan Shelton and Paul Ralph Kinsey—on December 1, 1983, had experience with the Twin Star model helicopter. Each of the pilots had flown the helicopter approximately every third day during the entire time they had been assigned to Valley Hospital. Each of the pilots had also inspected the Twin Star helicopter approximately every third day since they had been assigned to Valley Hospital.

16. There were oral agreements in addition to the written agreement regarding the lease of the Twin Star. Aerospatiale agreed to bring all of the maintenance work up to date utilizing its own technical expert, Ben Yelle. Aerospatiale agreed to provide a backup helicopter while the work was being performed on the leased helicopter.

17. Yelle began work on the aircraft in mid-November, 1983. After performing work on the aircraft, he reported to Wolfram that the maintenance on the aircraft was up to date. After he had left and gone back to Dallas, the pilots reported oil spraying freely from the No. 1 engine and Yelle was called back. He worked on the engine of the aircraft again and reported that the problem had been fixed. Once again Yelle left Las Vegas and went back to Dallas. Shortly thereafter the pilots discovered other problems with the engine and Yelle was called back.

18. Yelle worked a third time on the aircraft and completed his work on the evening of December 6th and again returned to Dallas. After completing his work on the evening of the December 6th, he certified that the aircraft was airworthy. There was never a final test of the aircraft in which the pilots considered it satisfactory. The crash of the aircraft occurred while it was being operated the following morning.

19. Under the work schedule at Valley Hospital, the pilot for the day commenced his shift at about 8:00 A.M. At that time, the pilot was supposed to conduct a preflight inspection of the aircraft to make himself aware of all of the components of the aircraft, the logbooks, and any outstanding maintenance requirements and to visually satisfy himself that the aircraft was in an airworthy and legal condition to be ready for flight. The flight manual for the Twin Star helicopter outlines a specific procedure for making a preflight inspection. The logbook for the Twin Star shows no preflight inspection entry for the morning of December 7, 1983, by Paul Kinsey or anyone else.

20. The Twin Star helicopter that crashed had been undergoing maintenance prior to December 6, 1983.

21. The ultimate decision whether to fly a particular aircraft belongs to the pilot. The Twin Star helicopter

that crashed had been undergoing maintenance prior to December 6, 1983.

22. The accident made the basis of Aerospatiale's claim for indemnity occurred when the helicopter was on a trip from Las Vegas to Needles, California to pick up a patient. An eyewitness, Murray Bishop, saw the aircraft a few blocks from the helipad with the cowling in the open position. He did not see the stow rod in a fixed position but thought the suction of the blades was holding the cowling open.

23. An engine cowling is simply a cover for the engine.

24. As the aircraft traveled over McCarran Airport, a piece of engine cowling fell from the helicopter and apparently landed on the runway. The piece of cowling that fell had "Flight for Life" stenciled on it. The helicopter proceeded past the McCarran Airport toward Black Mountain, where the crash occurred. Hilt, Kinsey and Hasselfeld died in the crash. Each was acting in the course and scope of his or her employment for Valley Hospital at the time of the crash.

25. Prior to the time the emergency call was received, the cowling had been open on the engine. When the emergency call was received, Kinsey released the stay rod and closed the cowling. The pilot was observed to be applying the usual technique to positively lock the cowling.

26. The accident in question occurred when the cowling came open and separated from the aircraft and came in contact with the anticipator cable. The torque meter for the No. 1 engine was not operational. The pilot apparently believed that the No. 2 engine was a "runaway engine." He cut back the power on the No. 2 engine, and the aircraft lost power and crashed killing Kinsey, Hilt and Hasselfeld.

27. Jim Moran testified that in his opinion with the cowling part of the aircraft, the stay rod, which is

normally used to hold the cowling open, came into contact with, and apparently snagged, a coiled steel anticipator cable connected to the governor controlling the fuel input to the helicopter's left engine. The resulting damage reduced the left engine to idle speed and took that engine off-line as a power source for the helicopter.

28. The Twin Star helicopter is equipped with two engines. If one engine fails, the aircraft automatically shifts the power requirements to the other engine. The Twin Star is capable of continuing to fly on one engine if the other engine fails.

29. After the helicopter lost one of its two engines over McCarran Airport, the Valley Hospital pilot continued to fly the aircraft for approximately six minutes, for a distance of approximately ten miles to the south. The aircraft was flown during the six minute period over numerous places where the helicopter could have landed safely. The aircraft flew over McCarran Airport and near a second airport, Las Vegas Henderson Sky Harbor Airport. Until the helicopter neared the crash scene, the terrain over which the helicopter flew was flat; and there were numerous streets, highways, and other suitable places where the helicopter could have landed.

30. The Flight Manual for the Twin Star helicopter sets forth the procedures to be followed in the event of a governor failure during flight, which is what the pilot experienced when the cowling departed the aircraft. Those procedures are:

> Ensure that the engine producing most power remains within its limitations.
>
> *Slightly reduce the collective pitch.*
>
> *If the power drops on the engine producing most power: the defective governor is that on the engine producing the least power.*

If the power does not drop on the engine producing most power, this engine has a defective governor system.

1) Increase the collective pitch if necessary to maintain NR in the green sector.

2) *Gently close the fuel flow control lever for the defective engine and check that power increases on the other engine.*

3) Set the defective engine at 40% torque.

4) *After landing* and before reducing the collective pitch to the low pitch stop, place the fuel flow control lever for the defective engine in the idle position gate.

(Emphasis added). The Valley Hospital pilot did not follow these prescribed procedures. The Flight Manual is required to be aboard the aircraft during flight and the pilot must be very familiar with the emergency procedures therein.

31. Four suits were filed in federal district court in Las Vegas, Nevada against Aerospatiale by the families of the three occupants of the Twin Star helicopter. The Original Complaints alleged negligence and strict liability against Aerospatiale in the design of the aircraft. The theory was that the aircraft was defective in that it did not have a light or warning system to notify the pilot that the cowling was open. After filing the suit, allegations were added that the aircraft had been negligently maintained by Aerospatiale.

32. There were never any contentions in the underlying lawsuits that the pilot was an employee of Aerospatiale or that Aerospatiale was vicariously liable for the pilot's operations. In addition, there were no contentions in the underlying lawsuits that Aerospatiale was liable for Valley Hospital's use or operation of the helicopter.

33. Operation of the aircraft with the cowling open would not be prudent. Such operation could pose a danger to the occupants and would involve an unreasonable risk of harm.

34. The aircraft in question did not have a warning light to alert the pilot that the engine cowling was open. There was no physical reason why a warning light could not be installed to alert the pilot when the engine cowling was open. The baggage compartment on this same aircraft had such a light. Other helicopters built by Aerospatiale, such as the Puma, incorporated an engine cowling warning light system in the design.

35. In its post-manufacture inspection of the aircraft, Aerospatiale did not note the absence of the warning light.

36. The Federal Aviation Administration (FAA) issued, on October 19, 1982, a standard airworthiness certificate for the Twin Star helicopter that crashed. The regulations of the FAA prescribing airworthiness requirements for rotorcraft do not require any warning device for open engine cowlings.

37. Aerospatiale was aware of some eight to ten instances involving other aircraft that had been reported to it where the cowling had been left open or had come open during flight. Most, if not all, of these instances involved the Twin Star or the A Star aircrafts. Despite some eight to ten reported instances of the cowling coming open during flight or being left open, Aerospatiale did not undertake any investigation into these events nor did it take any remedial measures.

38. Some owners of the Twin Star had taken it upon themselves to install an additional safety latch to prevent this type of incident from happening. Either the pilot or the mechanic had made a request for Air West to install a double locking mechanism on this aircraft. If a warn-

ing light had been put on this particular aircraft, it would have averted the accident.

39. Before and at the time of the accident, the responsibility for the maintenance of the aircraft rested with Aerospatiale. After Chapter VII Bankruptcy was filed by Air West prior to October of 1983, the responsibility for the maintenance of the aircraft was shifted to Aerospatiale. As part of the agreement with Valley Hospital, Aerospatiale agreed to bring all of the maintenance work on the aircraft up to date utilizing its own technical expert.

40. The No. 1 torque meter was inoperable at the time of the accident. The torque meter would be one of the most important instruments in determining the type of difficulty that was experienced in this aircraft. It would not be proper maintenance practice to certify the aircraft as airworthy if a torque meter were inoperable.

41. Upon execution of the lease, a telex describing the insurance policy Valley Hospital had obtained was forwarded to Mr. McPhilimy, Aerospatiale's representative. Upon inspection of the telex, Mr. McPhilimy was put upon notice that the particular policy Valley Hospital had purchased contained a $25,000.00 "In-Motion Deductible." Such a deductible represents the norm in the aircraft rental business; in fact, it is seldom that this type of policy is issued without such a provision.

42. In those instnaces where Aerospatiale found the inclusion of such a deductible to be unacceptable, it would notify the Lessee of the fact and insist that no deductible be included in the policy. In the case at bar, no such rejection was made by Aerospatiale. Aerospatiale never notified Valley Hospital that the inclusion of the $25,000 "In-Motion" deductible was not acceptable and never insisted that it be eliminated.

43. UHS is not a party to the lease, and it did not have any contractual relationship with Aerospatiale.

44. Paul Kinsey, Jessica Hilt, and Chris Hasselfeld were not employees of UHS.

45. After June 24, 1985, Aerospatiale entered into agreements to compromise and settle the three Nevada actions. The *Kinsey* action was settled for $320,000.00, which amount was paid on August 13, 1985. The *Hilt* action was settled for $1,000,000.00, which amount was paid on September 5, 1985. The *Hasselfeld* action was settled for a payment of cash and the purchase of a structured settlement costing a total of $675,000.00, which amount was paid on August 26, 1985. On the basis of a stipulation of settlement, the Nevada actions were dismissed by the Federal District Court.

46. On several occasions, Aerospatiale formerly tendered the defense of Aerospatiale and three of the Nevada actions to Valley Hospital and its insurers and demanded that Aerospatiale be defended, indemnified, and held harmless from the Plaintiffs' claims. Both Universal and Universal-Nevada declined to assume the defense of Aerospatiale in the Nevada actions.

47. Aerospatiale also notified Defendants and their insurer that counsel for some of the Plaintiffs in the Nevada actions and approached Aerospatiale with a settlement proposal. Aerospatiale demanded that Defendants and their insurers take advantage of the opportunity to settle. Both Universal and Universal-Nevada declined to participate in any settlement negotiations.

48. Aerospatiale's settlements of the three Nevada actions were reasonable in light of Aerospatiale's potential liability to the Plaintiffs.

49. In the lease agreement, Valley Hospital agreed to insure the helicopter, at Valley Hospital's expense, against total loss "in an amount not less than . . ." $878,000. Valley Hospital also agreed to obtain all risk hull insurance in the amount of not less than $878,000. As a result

of the crash on December 7, 1983, the helicopter was a total loss.

50. The aircraft physical damage coverage insurance obtained by Universal-Nevada for the helicopter contained a $25,000 in-motion deductible. When Aerospatiale accepted insurance with a deductible, it viewed the lessee as having self-insured the aircraft up to the deductible amount.

51. On August 16, 1984, Universal-Nevada released to Aerospatiale an insurance company check for $853,000, which was proceeds from the aircraft physical damage insurance coverage obtained by Universal-Nevada (the $878,000 amount required by the lease agreement less the $25,000 deductible). On September 17, 1984, Aerospatiale made demand upon Valley Hospital to pay the $25,000 deductible amount. Neither of the Defendants has paid Aerospatiale the $25,000 deductible amount.

52. The legal expenses incurred in defending Aerospatiale in the Nevada actions totaled $98,393.63. Those expenses were reasonable and necessary.

53. Valley Hospital was, at all relevant times, a subscriber to the Nevada Industrial Insurance Act.

54. Any conclusion of law that constitutes a finding of fact, or a mixed question of law and fact, is hereby incorporated as a finding of fact.

II.

CONCLUSIONS OF LAW

1. Nevada law governs the interpretation of the indemnity provisions of the lease insofar as claims for indemnity for injuries to or death of employees of Valley Hospital are concerned.

2. Application of Texas law to the indemnity provisions of the lease would be contrary to a fundamental policy of Nevada.

3. Nevada has a materially greater interest in applying its law to the indemnity provisions of the lease than Texas.

4. Under § 188 of the Restatement (Second) Conflict of Laws, the law of Nevada would be the applicable law to govern the indemnity agreement in the absence of the choice of law clause.

5. Under Nev. Rev. Stat. § 616.265 (1979), indemnity agreements, express or implied, are void to the extent that a third party seeks indemnification for damages paid to an employer's employee from an accident in the course of employment.

6. Under Nev. Rev. Stat. § 616.265 (1979), Aerospatiale is prohibited from obtaining indemnity from Valley Hospital for amounts it paid in settlement of the claims brought by the survivors of Paul Kinsey, Jessica Hilt and Chris Hasselfeld.

7. Article 8306, § 3(d) of the Texas Workers Compensation Act prohibits claims for indemnity by third parties against an employer for injuries to an employee in the absence of a written agreement expressly assuming such liability executed by the employer prior to such injury or death.

8. In the indemnity agreement in the lease between Aerospatiale and Valley Hospital, Valley Hospital did not "expressly assume liability" for injuries to its employees. Thus, even under Texas law, the indemnity claim of Aerospatiale would be barred.

9. The claims asserted in the underlying lawsuits against Aerospatiale do not fall within the scope of the indemnity agreement.

10. The claims asserted against Aerospatiale in the underlying lawsuits did not arise on account of Valley Hospital's use or operation of the helicopter in question.

11. The indemnity agreement in the lease did not clearly and unequivocally provide indemnity to Aerospatiale for Aerospatiale's own negligence, strict liability, and/or gross negligence.

12. The accident in question was caused in whole or in part by Aerospatiale's defective design and maintenance of the helicopter.

13. Aerospatiale's negligence in maintenance and failure to remedy its defective design of the helicopter constitute gross negligence.

14. The defective design and negligent maintenance of the aircraft constitute patent defects in the aircraft.

15. Valley Hospital satisfied the provisions of the lease regarding hull insurance by procuring the $878,000.00 policy which was accepted by Aerospatiale.

16. Aerospatiale has waived and is estopped from claiming that the $878,000.00 hull insurance policy did not satisfy the terms of the lease.

17. Since Universal was not a party to the lease and had no contractual relationship with Aerospatiale, it cannot and is not liable to Aerospatiale.

18. Any finding of fact that constitutes a conclusion of law, or a mixed question of law and fact, is hereby incorporated as a conclusion of law.

Signed this 4th day of December, 1986.

/s/ Leonard E. Koffman, Jr.
LEONARD E. KOFFMAN, JR.
Judge Presiding